



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1997

Mr. Robert E. Luna
Law Offices of Robert E. Luna
4411 North Central Expressway
Dallas, Texas 75205

OR97-0271

Dear Mr. Luna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103664.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for all personnel file information regarding a named individual. You inform this office that the subject of the request is a former employee who is now deceased. The requestor is the son of the former employee. Of the responsive documents, you contend that two categories of information may be excepted from required public disclosure by sections 552.101 and 552.102(b) of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

The materials you have submitted include a college transcript and several documents you categorize as evaluations. You claim that both are made confidential by law; however, you ask whether the documents remain confidential after the death of the subject of the records. We will address the evaluations first.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In the last legislative session, Senate Bill 1 was passed, which added section 21.355 to the Education Code. Section 21.355 provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office recently interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that

some of the documents you have submitted are evaluations as contemplated by section 21.355. However, some of the documents are not evaluations and must be released.

Although some of the requested documents are protected evaluations, you ask whether these records must be withheld after the death of the subject of the records. You ask if section 21.355 of the Education Code lapses after the death of the teacher. We have only addressed whether a statutory confidentiality provision lapses after the death of the subject of the information on a few occasions. Attorney General Opinion DM-61 (1991), JM-851 (1988), JM-229 (1984); Open Records Decision Nos. 536 (1989), 529 (1989), 524 (1989).

In Attorney General Opinion H-917 (1976), we first announced that this office would follow the uniform rule that the common-law right of privacy lapses upon death. *See* Open Records Decision No. 272 (1981). We have determined, however, that there is no similar presumption that prohibitions against disclosure in confidentiality statutes lapse upon the death of the subject of the information. Attorney General Opinion DM-61 (1991) at 3, JM-851 (1988) at 2; *see also* Attorney General Opinion JM-229 (1984); Open Records Decision No. 529 (1989). Whether a confidentiality provision lapses upon death is a question of statutory construction. Attorney General Opinion DM-61 (1991) at 3; Open Records Decision No. 524 (1989) at 3. We have previously stated that a confidentiality provision will lapse upon death when the statute is enacted merely to protect information that would not be covered by a common-law right of privacy or when the statute only protects a living person's privacy. Open Records Decision Nos. 536 (1989) (provision which protects police officer's photograph ceases to apply after death of officer), 524 (1989) at 3 (confidentiality of student records under Gov't Code § 552.114 lapses upon death). In other instances where we have found that a statutory provision would lapse upon death, we have determined that the statute was specifically applicable to living persons, and the circumstances involved the release of the information in question based on another statutory obligation. Attorney General Opinion DM-61 (1991) (death certificates); Open Records Decision No. 529 (1989) (autopsy reports). For example, in Open Records Decision Number 529 (1989), we stated that a confidentiality provision prohibiting the release of an AIDS test result would lapse upon death because the confidentiality provisions were expressed in language applicable to living persons, and a contrary interpretation would interfere with a medical examiner's statutory obligation to make full inquest reports. Conversely, we have held that when nothing in the statute indicates that the legislature intended the confidentiality provisions to apply only during lifetime, the statutory protection would not lapse upon the death of the subject of the information. Attorney General Opinion JM-851 (1988) at 2, JM-229 (1984) at 4.

After reviewing section 21.355 and other related provisions of the Education Code, we find nothing in the statute itself to indicate that the legislature intended the provision to apply only during the lifetime of the teacher or administrator. Furthermore, the confidentiality provision appears to protect more than the teacher's privacy interests. We conclude, therefore, that the district must withhold those documents which we have marked as confidential under section 21.355 of the Education Code. Attorney General Opinion JM-851 (1988). Section 21.355 of the Education remains in force after the death of the teacher

or administrator involved.

We now turn to your argument against disclosure under section 552.102(b). Section 552.102(b) of the Government Code excepts from disclosure a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, with the exception of the degree obtained and the curriculum. We believe that section 552.102(b) merely protects employee information that would not have been covered by a common-law right of privacy. Open Records Decision No. 526 (1989) at 2; see also *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (test to be applied to information claimed to be protected under section 552.102 is same as test under the doctrine of common-law privacy). Thus, we conclude that section 552.102(b) lapses upon the death of the subject of the information. See Open Records Decision No. 536 (1989), 524 (1989). Thus, you may not withhold this teacher's transcript based on section 552.102(b).

Notwithstanding this ruling, some of the information in the transcript includes the home address, phone number, social security number and family information of a former employee. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117(1) of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). We believe that this information must be withheld for an employee who requested that this information be kept confidential and who may now be deceased. By its very terms, section 552.117(1) contemplates "former" employees. This would include individuals who are no longer living. Moreover, the provision protects more than the employee's privacy interests. It also protects information revealing whether a public employee has family members. Section 552.117(1) protects both the employee and the former employee's family members who may still be living. Section 552.117(1) does not lapse upon the death of the former official or employee. Compare Attorney General Opinion No. JM-229 (1984) at 4 (statutory confidentiality for medical information does not lapse where statute expressly deals with release of information after subject's death) with Open Records Decision 536 (1989) (provision which protects police officer's photograph ceases to apply after death of officer because statute meant to protect living officer). We have marked the information that must be withheld if the former employee made the election not to allow public access to the information.

You next express concern that the requestor in this case may have a special right of access to the requested information. You explain that the requestor may be the "designated representative" under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy. We have not ruled that any of the information at issue is excepted by section 552.102(a) under the common-law right of privacy. See Open Records Decision No. 272 (1981) (common-law right of privacy lapses upon death). Thus, whether the requestor is a “designated representative” under section 552.102(a) is of no consequence to the release of the requested documents.

You also argue that the requestor may be the former employee’s “authorized representative” who has a special right of access to the information under section 552.023 of the Government Code. Section 552.023 provides that

(a) A person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.

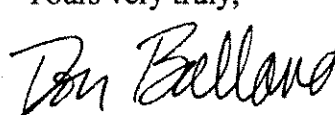
(b) A governmental body may not deny access to information to the person, or the person’s representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person’s privacy interests.

Section 552.023 of the Government Code grants a special right of access to a person or a person’s authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests. Thus, the special right of access provided by section 552.023 applies only when the requested information is about the person who is requesting the information. As we stated above, section 552.117 and section 21.355 of the Education protect more than the privacy interests of the named individual in this request. Therefore, section 552.023 does not provide the requestor a special right of access in this case. Cf. Open Records Decision No. 587 (1991); see also Open Records Decision Nos. 632 (discussing definition of “personal representative” and evidence establishing an individual’s personal representative status).

In conclusion, the district must withhold the evaluations that we have marked and any information which would reveal the home address, phone number, social security number and family information of the former employee. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is

limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Don Ballard". The signature is fluid and cursive, with the first name "Don" and last name "Ballard" clearly distinguishable.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 103664

Enclosures: Submitted documents

cc: Mr. Chris Parshall
2605 Lago Vista Loop
Irving, Texas 75062
(w/o enclosures)